Supreme Court, U.S.
FILED
MAY 30 2003
OFFICE OF THE CLERK

(9)

No. 02-626

In the Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
PETITIONER

v.

MICCOSUKEE TRIBE OF INDIANS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

THEODORE B. OLSON
Solicitor General
Counsel of Record

THOMAS L. SANSONETTI
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

JEFFREY BOSSERT CLARK
Deputy Assistant Attorney General

JEFFREY P. MINEAR
Assistant to the Solicitor General

JAMES C. KILBOURNE
ELLEN DURKEE
SYLVIA QUAST
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's longstanding practice of pumping accumulated water from a water collection canal to a water conservation area within the Florida Everglades constitutes an addition of a pollutant from a point source for purposes of Section 402 the Clean Water Act, 33 U.S.C. 1342, where the water contains a pollutant but the pumping station source itself adds no pollutants to the water being pumped.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	9
Conclusion	19

TABLE OF AUTHORITIES

Cases:

American Iron & Steel Inst. v. *EPA*, 115 F.3d 979 (D.C. Cir. 1997)	10, 13
Catskill Mountains v. *City of New York*, 273 F.3d 481 (2d Cir. 2001)	11-12
Dubois v. *United States Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996), cert. denied, 521 U.S. 1119 (1997)	11, 12
Fishermen Against the Destruction of the Env't, Inc. v. *Closter Farms, Inc.*, 300 F.3d 1294 (11th Cir. 2002)	15
National Wildlife Fed'n v. *Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988)	10
National Wildlife Fed'n v. *Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982)	10
Northern Plains Res. Council v. *Fidelity Exploration & Dev. Co.*, 325 F.3d 1155 (9th Cir. 2003)	14-15
United States v. *South Fla. Water Mgmt. Dist.*, 847 F. Supp. 1567 (S.D. Fla. 1992), aff'd in part and rev'd in part, 28 F.3d 1563 (11th Cir. 1994), cert. denied, 514 U.S. 1107 (1995)	3, 4

Statutes, regulations and rule:

Clean Water Act, 33 U.S.C. 1251 *et seq.*	9, 15
§ 301(a), 33 U.S.C. 1311(a)	7
§ 402, 33 U.S.C. 1342	2, 7, 9, 13
§ 502, 33 U.S.C. 1362	10
§ 502(6), 33 U.S.C. 1362(6)	7
§ 502(7), 33 U.S.C. 1362(7)	7

Statutes, regulations and rule: Page

§ 502(12)(A), 33 U.S.C. 1362(12)(A) 7, 10
§ 502(14), 33 U.S.C. 1362(14) 7
§ 505, 33 U.S.C. 1365 7
Flood Control Act of 1948, Pub. L. No. 80-858, § 203, 62 Stat. 1175 3
Water Resources Development Act of 1996, Pub. L. No. 104-503, 110 Stat. 3658:
§ 528(b)(1)(A)(i), 110 Stat. 3767 4
§ 528(f), 110 Stat. 3770 5
Water Resources Development Act of 2000, Pub. L. No. 106-541, 114 Stat. 2571:
§ 601(a)(5), 114 Stat. 2680 5
§ 601(b), 114 Stat. 2680 14
§ 601(b)(1)(A), 114 Stat. 2681 5
§ 601(b)(1)(A)(ii)(II), 114 Stat. 2681 5
§ 601(b)(2), 114 Stat. 2681 5
§ 601(b)(2)(A)(ii)(I), 114 Stat. 2681 5
§ 601(b)(2)(C)(iv), 114 Stat. 2682 7
§ 601(b)(2)(C)(v), 114 Stat. 2682 7
§ 601(f)(2)(A), 114 Stat. 2686 5
§ 602(a), 114 Stat. 2693 2
Fla. Stat. Ann. (West):
§ 373.416 (2000) 17
§ 373.416(1) (2000) 18
§ 373.4592 (Supp. 2003) 4
§ 373.4592(1)(a) (Supp. 2003) 2
§ 373.4592(1)(d) (Supp. 2003) 3
§ 373.4592(2)(h) (Supp. 2003) 4
§ 373.4592(9)(k) (Supp. 2003) 6, 17
§ 373.4592(9)(*l*) (Supp. 2003) 6, 17
§ 373.4592(10) <http://www.flsenate.gov/data/session 2003A/Senate/bills/billtext/pdf/s0054Aer.pdf> 18

Regulations and rule—Continued: Page

40 C.F.R.:
Pt. 122:
Section 122.28 17
Section 122.47 17
Pt. 123:
Section 123.25 17
Pt. 132, App. F 13
Sup. Ct. R.:
Rule 10 13
Rule 10(c) 16
Miscellaneous:
Marjory Stoneman Douglas, *The Everglades: River of Grass* (1947) 2

In the Supreme Court of the United States

No. 02-626

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
PETITIONER

v.

MICCOSUKEE TRIBE OF INDIANS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Petitioner South Florida Water Management District operates a pumping station that discharges water from a water collection canal through a levee into a water conservation area within Florida's Everglades. Pet. App. 2a-3a. The pumping station itself does not add any pollutant into the water being pumped. *Id.* at 3a. The water pumped from the water collection canal contains, however, higher levels of the pollutant phosphorus than the receiving water. *Ibid.* Respondents, the Miccosukee Tribe of Indians and the Friends of the Everglades, brought suit, arguing that petitioner must

obtain a permit under Section 402 of the Clean Water Act (CWA), 33 U.S.C. 1342, to engage in that activity. Pet. App. 2a. The district court ruled on summary judgment that petitioner must obtain a permit under the CWA for the pumping station and granted respondents' request for an injunction. *Ibid.* The court of appeals affirmed the district court's determination that a permit was necessary, but vacated the injunction and remanded the case for further proceedings. *Id.* at 14a. The United States urges the Court to deny the petition for a writ of certiorari because that fact-specific decision does not give rise to a conflict among the courts of appeals or otherwise present a question warranting this court's review.

1. The Everglades have been described as a "River of Grass" flowing from Lake Okeechobee to the Gulf of Mexico, with a width of up to 70 miles. Marjory Stoneman Douglas, *The Everglades: River of Grass* 10 (1947). Congress has identified this South Florida wetlands system as an important environmental "treasure" that "includes uniquely-important and diverse wildlife resources and recreational opportunities." Water Resources Development Act of 2000 (WRDA 2000), Pub. L. No. 106-541, § 602(a), 114 Stat. 2693. See also Fla. Stat. Ann. § 373.4592(1)(a) (West Supp. 2003) (Florida Legislature "finds that the Everglades ecological system not only contributes to South Florida's water supply, flood control, and recreation, but serves as the habitat for diverse species of wildlife and plant life.") Congress has also determined that preserving "the pristine and natural character of the South Florida ecosystem," including the Everglades, "is critical to the regional economy." WRDA 2000, § 602(a), 114 Stat. 2693.

The Everglades have unique hydrological characteristics. Water historically flowed in a slow, unimpeded sheet from Lake Okeechobee down through the Everglades to the sea, but the construction of drainage canals and related structures, initially by the State of Florida and later by the United States Army Corps of Engineers, has altered that natural regime. See, *e.g.*, Pet. App. 3a n.2. In 1948, Congress authorized the Corps' construction of the Central and South Florida Project (C&SF), a vast system of levees, canals, water impoundment areas, and other water control structures, which are designed to promote the multiple objectives of flood control, drainage, preservation of fish and wildlife, and control of regional groundwater and salinity in South Florida. Flood Control Act of 1948, ch. 771, § 203, 62 Stat. 1175; Pet. 9; Pet. App. 2a-3a.

In 1988, the United States brought an action against petitioner and the Florida Department of Environmental Regulation, alleging, *inter alia*, that those agencies allowed phosphorus-polluted water to be diverted into the Everglades National Park in violation of state law and federal contracts. See *United States* v. *South Fla. Water Mgmt. Dist.*, 847 F. Supp. 1567, 1569 (S.D. Fla. 1992), aff'd in part and rev'd in part, 28 F.3d 1563 (11th Cir. 1994), cert. denied, 514 U.S. 1107 (1995). Phosphorus levels are a defining element of the Everglades. In its natural state, the Everglades system is low in plant nutrients and organisms. It contains only limited amounts of phosphorus, which determines the type and distribution of aquatic flora and fauna. Adding phosphorus above natural levels causes an imbalance in the native flora and fauna and results in harmful growth. Pet. App. 16a-17a. See Fla. Stat. Ann. § 373.4592(1)(d) (West Supp. 2003) (Florida "Legislature finds that waters flowing into the Everglades

Protection Area contain excessive levels of phosphorus. A reduction in levels of phosphorus will benefit the ecology of the Everglades Protection Area.").[1]

The 1988 lawsuit resulted in a 1992 consent decree that required petitioner to construct stormwater-treatment areas, which are marshes designed to filter nutrients from farm-water runoff destined for the Everglades National Park. *South Fla. Water Mgmt. Dist.*, 847 F. Supp. at 1569-1570. It also required Florida to undertake a regulatory permitting program designed to improve the quality of runoff entering the Everglades. *Ibid.* In response, the Florida Legislature enacted the Everglades Forever Act of 1994 to facilitate implementation of the consent decree. Fla. Stat. Ann. § 373.4592 (West Supp. 2003).

Congress later required the Secretary of the Army to develop a "comprehensive plan for the purpose of restoring, preserving, and protecting the South Florida ecosystem." Water Resources Development Act of 1996 (WRDA 1996), Pub. L. No. 104-303, § 528(b)(1)(A)(i), 110 Stat. 3767. Congress specified that the plan "provide for the protection of water quality in, and the reduction of the loss of fresh water from, the Everglades," and include features as "necessary to provide for the water-related needs of the region, including flood control, the enhancement of water supplies, and other objectives served by the Central and Southern Florida Project." *Ibid.* Congress directed the Secretary to develop the plan in coordination with petitioner and in consultation with the South Florida Ecosystem Restoration Task Force, an intergovernmental body (with representatives from petitioner and one of the respondents, the Miccosukee Tribe) charged with coordinating the development of federal, state, and tribal policies and strategies to restore and protect the Everglades. WRDA 1996, § 528(f), 110 Stat. 3770-3772.

[1] The Everglades Protection Area encompasses the Everglades National Park, Water Conservation Areas 1, 2A, 2B, 3A, and 3B, and the Arthur R. Marshall Loxahatchee Refuge. Fla. Stat. Ann. § 373.4592(2)(h) (West Supp. 2003). Water Conservation Area 3A (WCA-3A) is one of the areas at issue in this action.

Four years later, in WRDA 2000, Congress approved the Comprehensive Everglades Restoration Plan (CERP) developed by the Secretary, which provides for modifications of the C&SF Project to "restore, preserve, and protect" the South Florida ecosystem (which includes the Everglades), "while providing for other water-related needs of the region, including water supply and flood protection." WRDA 2000, §§ 601(a)(5), 601(b)(1)(A) and 601(f)(2)(A), 114 Stat. 2680-2681, 2686. CERP is intended, in part, "to ensure the protection of water quality in, the reduction of the loss of fresh water from, and the improvement of the environment" of the ecosystem. *Id.* § 601(b)(1)(A), 114 Stat. 2681. To achieve CERP's goals, Congress has authorized more than one billion dollars in initial projects. See, *e.g.*, *Id.* 601(b)(2), 114 Stat. 2681-2683. In implementing those projects, the Secretary must "ensure that all ground water and surface water discharges from any project feature authorized by this subsection will meet all applicable water quality standards and applicable water quality permitting requirements." *Id.* § 601(b)(2)(A) (ii)(II), 114 Stat. 2681.

2. This case involves particular existing water control facilities that now comprise part of the C&FS Project. In the early 1900s, the United States Army Corps of Engineers began excavating what is now known as the C-11 Canal to facilitate drainage of west-

ern Broward County. Pet. App. 3a. Later, in the 1950s, as part of the C&SF Project, the Corps built two north-south levees, L-33 and L-37, and a pumping station, S-9, which is located where the two levees meet, at the north end of L-33 and the south end of L-37. Pet. 9; Pet. App. 3a. Petitioner now operates the S-9 pumping station. *Id.* at 2a-3a.

The L-33 and L-37 levees formed the western boundary of the C-11 Basin, which encompasses western Broward County, and created Water Conservation Area-3A (WCA-3A), extending west of the levees. Pet. App. 3a. Historically, the C-11 Basin and WCA-3A had both been part of the Everglades and, prior to the construction of the canal and levees, water flowed across both areas and generally towards the south. *Id.* at 3a & n.2, 8a & n.8, 28a. Because of the construction of the levees and the canal, water from the C-11 Basin flows west into WCA-3A only if the S-9 pumping station is operating. *Ibid.*

The C-11 Canal runs through the C-11 Basin, collecting water run-off from the Basin and seepage through the levees from WCA-3A, and terminates at the S-9 pumping station. Pet. App. 3a. The S-9 station pumps the water from the canal through three pipes into WCA-3A at the rate of 960 cubic feet per second per pipe. *Ibid.* Petitioner has obtained a water quality permit for the S-9 pumping station pursuant to the Everglades Forever Act. See Pet. 12; Fla. Stat. Ann. § 373.4592(9)(k) and (*l*) (West Supp. 2003). See also WRDA 2000, § 601(b)(2)(A)(ii)(I), 114 Stat. 2681 (projects under CERP to be carried out with the Secretary of the Army "tak[ing] into account the protection of water quality by considering applicable State water quality standards").

The water that the C-11 Canal collects and that the S-9 pumping station conveys contains phosphorus at levels higher than those found in WCA-3A. Pet. App. 3a. The pump station itself, however, adds no pollutants to the waters being pumped. *Ibid.* If the S-9 pumping station were closed down, western Broward County would become flooded, displacing a large number of people. Pet. App. 3a, 10a.

Congress has taken actions to reduce adverse environmental effects associated with the C-11 Canal and WCA-3A. As part of CERP, Congress has authorized projects such as levee seepage management at WCA-3A and 3B, at a total cost of $100,335,000. It has also authorized $124,837,000 for the C-11 impoundment and stormwater treatment area. WRDA 2000, § 601(b)(2)(C)(iv) and (v), 114 Stat. 2682.

3. In 1998, respondents brought a citizen suit under Section 505 of the CWA, 33 U.S.C. 1365, alleging that petitioner was in violation of Section 301(a) of the CWA, which prohibits the discharge of any pollutant into navigable waters, except in accordance with the pertinent provisions of the Act. 33 U.S.C. 1311(a). The CWA defines the "discharge of pollutants" to include "any addition of any pollutant to navigable waters from any point source." CWA § 502(12)(A), 33 U.S.C. 1362(12)(A). Respondents alleged that, under the CWA's definitions, the S-9 pumping station is a "point source" that adds "pollutants" to WCA-3A. See 33 U.S.C. 1362(6), (7) and (14). In respondents' view, the CWA therefore obligates petitioners to obtain a National Pollution Discharge Elimination System (NPDES) permit pursuant to Section 402 of the CWA, 33 U.S.C. 1342, for operation of the S-9 pumping station. Pet. App. 2a, 17a-18a, 20a-21a.

On cross-motions for summary judgment, the district court denied petitioner's motion and granted summary judgment to respondents. Pet. App. 2a, 20a-21a, 31a-32a. The district court first noted that the parties agreed that both the C-11 Canal and WCA-3A are "navigable waters" under the CWA and that the canal water discharged from S-9 contains "pollutants." *Id.* at 21a. It then concluded that "an addition of pollutants exists because undisputedly water containing pollutants is being discharged through S-9 from C-11 waters into the Everglades, both of which are separate bodies of United States water with * * * different quality levels." *Id.* at 28a. The court further concluded that S-9 "is a point source for which a NPDES permit is required." *Id.* at 29a. The district court enjoined petitioner from operating the S-9 pump station without an NPDES permit, but stayed its ruling pending appeal. *Id.* at 2a, 12a n.12, 31a-32a.

4. The court of appeals affirmed "the district court's judgment that the Water District violated the Clean Water Act," but vacated the injunction and remanded for further proceedings. Pet. App. 14a. The court of appeals noted that there was no dispute that the S-9 pump station constitutes a point source, that the waters released by the pump station contain pollutants, and that both the C-11 Canal and WCA-3A are navigable waters. *Id.* at 5a. The parties did dispute, however, "whether the pumping of the already polluted water constitutes an *addition* of pollutants to navigable waters *from* a point source." *Ibid.* The court of appeals concluded "that an addition from a point source occurs if a point source is the cause-in-fact of the release of pollutants into navigable waters," *id.* at 7a, and that the S-9 pump station added pollutants to WCA-3A because, except for the operation of that pump station, the

polluted waters from the C-11 Canal would not have flowed there. *Id.* at 7a-9a. The court of appeals nevertheless vacated the district court's injunction, because "the district court could not have correctly balanced the possible harms—especially the harm to the public—caused by the enjoinment of S-9 against the benefits when it granted the injunction." *Id.* at 13a. Instead, the court of appeals directed the district court to "order the Water District to obtain an NPDES permit within some reasonable time period." *Id.* at 14a.

DISCUSSION

The court of appeals' decision requires petitioner to obtain a Clean Water Act permit for the operation of a pumping station that discharges polluted water from a water collection canal to the waters of a water conservation area. The water-control facilities are part of a larger, interlocking system to control the waters of the South Florida ecosystem, including the Everglades, which has a distinctive hydrological character, history, and regulatory regime. The court of appeals' decision, especially in light of its distinctive setting, does not warrant review at this time. It does not conflict with any decision of this Court or another court of appeals. And although the court of appeals' ruling could potentially subject petitioner to additional administrative burdens, the extent of those burdens at this juncture is uncertain and could be relatively modest. More importantly, the decision appears unlikely to result in any change in the operation of the pumping station or to subject petitioner to additional pollution control requirements beyond those that are already required under Florida's recently amended Everglades Forever Act. Under these circumstances, the Court should not review the court of appeals' interlocutory decision at

this time, but should instead await further developments under the unique statutory framework and factual context of this case.

1. *The court of appeals' decision does not give rise to a conflict with any decision of this Court or of another court of appeals.* The question in this case is whether petitioner's longstanding practice of pumping accumulated water from the C-11 Canal to WCA-3A constitutes a discharge of a pollutant from a point source for purposes of Section 402 of the CWA, where the water contains pollutants—in particular, excess phosphorus—but the S-9 pumping station that discharges the water adds no pollutants to the waters being pumped. That determination depends on the application of a series of statutory provisions that define the terms "pollutant," "navigable waters," "discharge of a pollutant," and "point source." See CWA § 502, 33 U.S.C. 1362. The application of those terms, in turn, often depends on fact-intensive inquiries. See, *e.g.*, *American Iron & Steel Inst.* v. *EPA*, 115 F.3d 979, 999 (D.C. Cir. 1997). In particular, this case involves the meaning of "discharge of a pollutant," which, as relevant here, means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A).

Petitioners contend (Pet. 14-18) that the courts of appeals are in conflict on the meaning of the statutory term "addition" in the context of whether Section 402 applies to water control facilities. Petitioners are mistaken. Over the years, the lower courts have distinguished between two situations for purposes of imposing NPDES permitting requirements on such facilities. The courts of appeals have ruled that, when a water control facility, such as a dam or pump, directs the flow of water from one part of a single water system to another part of the same water system, the

control facility does not result in the "addition" of a pollutant, even if the facility induces water quality changes, so long as the facility itself does not contribute new contaminants to the water. The courts encountered that issue in *National Wildlife Federation* v. *Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), and *National Wildlife Federation* v. *Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988).[2]

Other courts of appeals have ruled, however, that when a water control facility transfers polluted water from one distinct and separate body of water to another less-polluted body of water, the transfer of polluted water results in an "addition" of pollutants to the more pristine body of water, and an NPDES permit is therefore required. The courts of appeals have addressed that issue in *Dubois* v. *United States Department of Agriculture*, 102 F.3d 1273, 1296-1299 (1st Cir. 1996), cert. denied, 521 U.S. 1119 (1997), and *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New*

---

[2] In *Gorsuch*, environmental plaintiffs petitioned EPA to impose NPDES permit requirements on dams that stored and periodically released water. The impoundment and release of stored water resulted in "dam-induced changes," including low dissolved oxygen, dissolved minerals and nutrients, temperature changes, and supersaturation. 693 F.2d at 161-164. The court of appeals concluded, in accordance with EPA's views, that the dam operator did not need to obtain an NPDES permit in that circumstance. *Id.* at 161, 170-183. In *Consumers Power*, environmental plaintiffs sought to impose NPDES permit requirements on a hydroelectric facility that drew water from Lake Michigan into a man-made impoundment above a dam and generated power by discharging the lake water back into the Lake through the dam's turbines. 862 F.2d at 581-582. Live fish, dead fish, and fish remains became entrained in the system and were returned to the Lake. *Id.* at 582-583. The court of appeals concluded that the dam operator also did not need to obtain an NPDES permit in that situation. *Id.* at 581.

York, 273 F.3d 481, 490-492 (2d Cir. 2001). Those decisions distinguished *Gorsuch* and *Consumers Power* on the basis that, in each of those latter cases, the water was returned to a water body that was essentially the same as that from which it came. See *Catskill Mountains*, 273 F.3d at 491-492; *Dubois*, 102 F.3d at 1299.[3]

In this case, the courts below ruled that the situation before it resembled *Dubois* and *Catskill Mountains*, rather than *Gorsuch* and *Consumers Power*, reasoning that the S-9 pump station transferred water between "two separate bodies of water," namely, the C-11 Canal and WCA-3A. Pet. App. 5a-9a, 28a-29a. The court of appeals accordingly concluded that the S-9 pump station's operation resulted in an addition of a pollutant from a point source and therefore required an NPDES permit. *Id.* at 9a.

If the court of appeals' characterization of the water control facilities in this case is correct, then its decision

---

[3] In *Dubois*, a ski resort proposed to transfer water from a river at the base of the ski slope, use it to operate snow-making equipment, and then discharge it into Loon Pond, a small naturally occurring lake at a higher elevation. 102 F.3d at 1296-1297. The river was of lower water quality than the pond, which was colder and had lower levels of phosphorus, and would not normally flow into the pond. *Id.* at 1298-1299. The court held that, regardless of whether the resort's snow-making equipment contributed additional pollutants, the transfer required an NPDES permit. *Id.* at 1296 n.29. Similarly, in *Catskill Mountains*, the court of appeals held the City of New York's transfer of water allegedly containing suspended solids through a several-mile-long tunnel from a reservoir into a creek, which was naturally clearer and cooler than the reservoir and which the water would otherwise not reach, would also qualify as an "addition" of a pollutant for purposes of the CWA that required an NPDES permit. 273 F.3d at 484-485, 492.

simply follows the currently prevailing approach in the courts of appeals to discharges from water control facilities and presents no conflict with any decision of this Court or another court of appeals. The case would be similar to *Catskill Mountains* and *Dubois*, rather than to *Consumers Power* and *Gorsuch*. If the court of appeals' characterization of the particular water control facilities here is incorrect, and the case should instead be regarded as similar to the latter two cases, then there is also no conflict. Rather, in that event, the court's error rests on a fact-specific determination respecting only the proper characterization of those facilities, and that issue presents no issue of nationwide or general importance. In either event, in the absence of a showing of additional exceptional circumstances, there would be no "compelling reasons" for this Court to grant a petition for a writ of certiorari. See Sup. Ct. R. 10.[4]

In the United States' view, the lower courts' characterization of the water control facilities, which presents a mixed question of law and fact, may well be incorrect. The C-11 Canal and WCA-3A can appropriately be viewed, for purposes of Section 402 of the Clean Water Act, as parts of a single body of water. The characterization is appropriate because the C-11 Basin, the C-11 Canal, and WCA-3A share a unique, intimately related, hydrological association. Furthermore, those components were created and are managed

---

[4] Significantly, none of the cases cited in the text would necessarily control other factually distinguishable situations, such as where an industrial facility withdraws water for an intervening use and reintroduces the water to the same waters of the United States. See *American Iron & Steel Inst.*, 115 F.3d at 998 (rejecting challenge to EPA's intake credits rule, 40 C.F.R. Pt. 132, App. F, Procedure 5(D) and (E), as unripe).

pursuant to legislative direction—by both the United States and the State of Florida—as a part of a single integrated resource. Indeed, in recognition of the unique characteristics of the South Florida ecosystem, Congress, in WRDA 2000, adopted and implemented the "Comprehensive Everglades Restoration Plan" to ensure a comprehensive, integrated approach to regulating and restoring the water quality of the area. See WRDA 2000, § 601(b), 114 Stat. 2680-2681.

Although the lower court's characterization of the water control facilities at issue as creating distinct bodies of water for CWA purposes may be incorrect, the correction of that error—which would turn on the characteristics of a number of special statutes, the historic and current hydrology of the Everglades, and characteristics of the water control facilities themselves—would involve a fact-intensive examination of record and non-record material in light of the interlocking framework of federal and state laws that govern water resources in the Everglades region. This Court does not normally undertake such an examination through the grant of a writ of certiorari.

2. *The court of appeals' decision does not present an issue of exceptual or nationwide importance.* Petitioner exaggerates in suggesting (Pet. 23) that the court of appeals "has fundamentally extended the scope of the NPDES program." The court of appeals decision appears to have limited precedential importance beyond the operation of the Everglades facilities. Because the court of appeals embraced and applied the distinction under existing case law between water control facilities for single water systems and water control facilities that direct flow from one water body to another, its decision makes no change in the relevant case law and thus breaks no new doctrinal ground. See

Northern Plains Res. Council v. *Fidelity Exploration & Dev. Co.*, 325 F.3d, 1155, 1162 (9th Cir. 2003) (citing *Catskill Mountains*, *Dubois*, and the decision in this case for the proposition that "other circuits have held that transporting water from one water body to another can violate the CWA").[5]

Indeed, the court of appeals' decision in this case may have circumscribed consequences even with respect to the Everglades facilities. Six months after it decided this case, the Eleventh Circuit decided *Fishermen Against the Destruction of the Environment, Inc.* v. *Closter Farms, Inc.*, 300 F.3d 1294 (11th Cir. 2002), which involved application of the CWA to drainage canals serving farmland previously submerged part of the year under Lake Okeechobee, but now separated from the Lake by a dike. See *id.* at 1296. The canals transported and discharged into Lake Okeechobee excess water that collected on the farmland. *Id.* at 1296-1297. The court of appeals recognized that the CWA exempts "agricultural stormwater discharges and return flows from irrigated agriculture" from the

---

[5] This Court may ultimately have occasion to review whether the principle followed in *Catskill Mountains* and *Dubois*—that a discharge of polluted water from one body of water to a distinct and more pristine body of water requires an NPDES permit—is correct. But at the present time, no court of appeals has squarely considered and rejected the reasoning of those decisions, which involve a relatively narrow and perhaps unrepresentative sample of situations in which the issue might arise. This case presents a particularly unsuitable occasion to reach that issue because, as noted above, the court of appeals may well have erred in treating the C-11 and the WCA-3A as separate water bodies, there is an alternative statutory scheme in place for addressing water quality, specifically including phosphorus levels, on a comprehensive basis in the Everglades, and the predicate for applying that principle may not be truly present in this case.

definition of "point source," and accordingly ruled that the canals and associated pumping facilities transporting water from the farmland were exempt from the NPDES requirement. *Ibid.* Far from applying a blanket rule that all movement of water requires an NPDES permit (see Pet. 23), the court of appeals recognized the need, even after the decision at issue here, to give careful consideration to the facts in each case.

3. *The court of appeals' decision is unlikely to subject petitioner to any substantial new pollution control requirements.* This Court's Rules provide that a writ of certiorari may be appropriate, even in the absence of a conflict among the courts of appeals, if the lower court has decided "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). This Court, however, does not lightly invoke that principle, and this case does not present circumstances warranting review on that basis. As an initial matter, the question here involves the application of statutory provisions to a particular factual situation. While the court of appeals may well have erred, its mistake arises from the misapplication of legal principles that have not generated any conflict among the courts of appeals. Furthermore, it is not clear at this time that the decision will impose inordinate burdens on petitioner, particularly in light of the court of appeals' dissolution of the district court's injunction. See Pet. App. 9a-14a.

The court of appeals ruled that the imposition of injunctive relief that could halt the operation of the S-9 pump station is inappropriate in light of the compelling public interest in the continued operation of that facility. See Pet. App. 12a ("From the record before us, we cannot conclude that the district court's injunction

could ever be properly enforced."). The court of appeals accordingly has directed that the district court merely "should order [petitioner] to obtain an NPDES permit within some reasonable period." *Id.* at 14a. The burden that this obligation entails is currently uncertain and may be relatively modest.

For example, the permitting authority in this case—the Florida Department of Environmental Protection—may be able to issue a general permit that considerably streamlines the permitting process. See 40 C.F.R. 122.28, 123.25. Furthermore, an NPDES permit can provide considerable flexibility in any schedules for compliance. See 40 C.F.R. 122.47. And it appears at least questionable that the NPDES permit would subject petitioner to any significant environmental obligations beyond those that petitioner already faces under other existing laws.

Petitioner was required to obtain a state water quality permit for the S-9 pump station pursuant to the Everglades Forever Act, which requires that petitioner comply to the maximum extent practicable with state water quality standards according to phased—in compliance schedules and strategies set forth in the permit. Pet. 12; Fla. Stat. Ann. § 373.4592(9)(k) and (*l*) (West Supp. 2003). An NPDES permit for S-9 could take a comparable approach, replicating the standards and compliance schedule in the existing state permit. Moreover, the Everglades Forever Act, as recently amended, includes a requirement that, by December 31, 2006, petitioner and the State of Florida

> take such action as may be necessary * * * so that water delivered to the Everglades Protection Area achieves in all parts of the Everglades Protection

> Area state water quality standards, including the phosphorus criterion * * *.

Id. § 373.4592(10) <http://www.flsenate.gov/data/session/2003A/Senate/bills/billtext/pdf/s0054Aer.pdf> (at p. 42). See note 1, *supra* (describing the Everglades Protection Area). Sections 373.4592(9)(k) and (*l*) further require that petitioner comply with Section 373.416 of the Florida Statutes, which requires that

> the operation or maintenance of any stormwater management system, dam, impoundment, reservoir, appurtenant work, or works * * * will not be harmful to the water resources of the district.

Id. § 373.416(1). In addition, the Comprehensive Everglades Restoration Plan, which Congress approved through WRDA 2000, authorizes specific projects to address water quality concerns, including projects specifically directed at WCA-3A. See p. 5, *supra*.

In light of the focused federal-state attention to restoring the Everglades, including WCA-3A, on an ecosystem-wide basis, the NPDES permitting process may be reconcilable with, and integrated into, those ongoing efforts. In any event, that process appears unlikely to result in any change in the operation of the pumping station or to subject petitioner to additional pollution control requirements beyond those currently required or planned under federal or state law. The same may hold true if, as petitioner fears (Pet. 4), other courts later conclude that other similarly situated pumping stations are subject to NPDES permitting requirements.

Consequently, the Court's review in this case may have little practical significance for petitioner's actual obligations or for the water quality of the Everglades. Furthermore, because the court of appeals' decision is

interlocutory, petitioners will have an opportunity to seek relief from the court of appeals, or this Court, if the district court's order on remand results in unexpected hardship. In light of all these circumstances, and the absence of any conflict among the courts of appeals or other compelling reasons justifying the issuance of a writ of certiorari, the United States submits that the court of appeals' decision does not warrant review at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
THOMAS L. SANSONETTI
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JEFFREY BOSSERT CLARK
Deputy Assistant Attorney General
JEFFREY P. MINEAR
Assistant to the Solicitor General
JAMES C. KILBOURNE
ELLEN DURKEE
SYLVIA QUAST
Attorneys

MAY 2003